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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 608

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY INC. and THE ARTHUR A. JOHNSON CORP., doing business as BERMUDA BASE CONTRACTORS,

Petitioners,

against—

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, JOSEPH JOHN GILROY, JOHN JOSEPH MORTIMER, JAMES F. McDONALD, PAUL F. NEITER, WILLIAM H. PARKER, JR., LOUIS AUGUST REHBERG, HOWARD L. SHOCK, JR. and DAVID JOSEPH TOWNSEND,

Respondents.

RESPONDENT'S BRIEF.

JACOB BROMBERG,
SOL L. FIRSTENBERG,
Attorneys for Respondents.

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RESPONDENT'S BRIEF.

For the reasons hereinafter stated it is respectfully submitted that petition for writ of certiorari to review the judgment entered by the United States Circuit Court of Appeals should be denied.

QUESTION PRESENTED.

It is submitted that the question as presented by petitioners is stated incorrectly. The issue is not whether the outlying base in Bermuda leased to the United States for 99 years by the British Government is a "territory or possession" of the United States "with the consequence" that the Fair Labor Standards Act (29 U. S. C. A. Sec. 201, *et seq.*) applies; but rather whether within the broad coverage of the Act ("to extend federal control" in the field of working conditions "throughout the farthest reaches of the channels of interstate and foreign commerce"—*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567), the area so leased (Executive Agreement Series No. 235, *Leased Naval and Air Bases*, 55 Stat. Pt. 2, 1560-1594) is a possession within the meaning of the Fair Labor Standards Act in a controversy "between private parties".

STATEMENT.

The United States Government leased from the British Government the outlying base area in Bermuda "to hold unto the United States for a term of ninety-nine years" with the "rights, powers and authority, and on the terms and conditions" stated in the contemporaneous agreement which "shall be regarded as incorporated in and made part of this lease" (55 St. Pt. 2, 1577; R. 90). The agreement does not specifically declare the leased areas to be part of the United States but the cumulative effect of its various provisions "compels the conclusion that the areas are subject to fully as complete control by the United States as obtains in other areas * * *" (Opinion below, R. 91).

A summary of the terms and conditions of the Executive Agreement and lease (55 Stat. Pt. 2, 1560-1594) is set out in the opinion of the Circuit Court (R. 90-92).

The United States Government contracted with the petitioners for the construction of a defense base in such leased area in Bermuda. The construction of this base was an undertaking of enormous proportions (R. 21). The respondents were hired as patrolmen and firemen to police, guard and protect the divers activities of the defendants on the Island of Bermuda (R. 66, 67): The respondents were required to, and did do a great deal more than protect original construction work, as stated by petitioners in their petition (p. 4). They were required to protect not only the construction work, but goods, merchandise, materials, equipment, tools, etc., which were loaded and unloaded on and from ships; stored on docks and elsewhere for reshipment; transferred on trucks from docks to the bases and from the bases to the docks; enormous amounts of supplies etc., recrated for shipment to other areas and return to the United States (R. 18, 22, 23, 35, 43, 48, 62, 66, 67).

The respondents sued under the provisions of the Federal Labor Standards Act of 1938 (R. 9-11) in the Supreme Court of New York, which action was transferred to the United States District Court for the Southern District of New York (R. 1). On motion of petitioners (R. 19) the District Court granted summary judgment dismissing the complaint on the ground that until the legislative and executive departments of our Government declare that such leased area is "within the sovereign jurisdiction of the United States" (R. 80) the Fair Labor Standards Act of 1938 does not apply.

On appeal the Circuit Court of Appeals reversed, holding that [1] the nature of the control over these areas, the scope of the grant, "is important for our purposes" (R. 90) and since "before us is a matter of interpretation of an Act in issue between two groups of private parties" (R. 92) the Court need not await a formal declaration by the legislative and executive departments of government in order to determine this private controversy (R. 93); and [2] after indicating the cumulative effect of the various provisions of the

lease and agreement (R. 91) which clearly grants to the United States the control of this area, the Court concluded:

> "* * * We are compelled to conclude that the intended coverage of the Act is sufficiently broad to include areas such as those here in question."

NO COMPELLING REASONS ARE STATED TO SUSTAIN GRANTING OF THE WRIT.

The Circuit Court in its opinion reviewed and carefully considered the reasons asserted by petitioners on this application. It is submitted that the Circuit Court made proper disposition of the contentions urged by the petitioners.

I.

The decision of the Circuit Court as already indicated, does not rest, as petitioners assert (p. 5), on the determination that these leased areas are "possessions of the United States." The facts are clearly distinguishable from the cases involving military bases in Greenland, Brazil, Iran and Canada.

> "* * * The facts in these cases indicate distinctions from those present here. There the problem was whether or not the Act would apply to persons working in foreign countries. Here there is a long lease entered into with our government which gives it sweeping powers in the area. Without such arrangements for control these other plaintiffs were shown only to be working in foreign countries to which the coverage of the Act has not been extended." (R. 92)

Respondents respectfully submit that the Circuit Court of Appeals did not hold that the naval and air base in Bermuda leased to the United States is a "possession" of the United States, as stated by petitioners (pp. 4-5); but held that within the broad intendment of the Fair Labor Standards Act of 1938, in a controversy between private parties, where the clear purpose of said Act is

> "'to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce,' *Walling* v. *Jacksonville Paper Co.*" (R. 92)

it covered

> "American workmen at Bermuda bases as fully as natives working in Samoa or Guam." (R. 92)

This holding, it is submitted, is therefore not erroneous.

II.

It is no ground for a review that the work was carried on upon the assumption by petitioners that the Act did not apply, or that public funds are involved; nor that other employees may have similar actions. (Portal to Portal Act of 1947, 29 U. S. C. A., Sec. 255, may have outlawed all such like actions.)

III.

Under the act, "commerce" means trade, etc., "among the several States or from any State to any place outside thereof." "To any place outside thereof," it is submitted, refers to any place where federal controls exist. Petitioners have at no time contended nor have they ever urged that the chan-

nels of commerce in the leased areas in Bermuda are beyond the control of the United States. This is the controlling factor in this case. It is not whether this area is a "possession of the United States" but rather is this area such a place where the federal government controls the flow of commerce? Nor is sovereignty a factor. The Court below properly decided this issue, in saying:

> "Defendants urge, and the district court agreed, that the question whether the areas are possessions is a political one, either already settled or to be settled only by executive or legislative determination. Undoubtedly courts should avoid the determination of political issues, but it is difficult to see how this is such an issue. Before us is a matter of interpretation of an Act in issue between two groups of private parties. Obviously this arises in consequence of political acts, and those conceivably might have been of such precise form or exact agreement with a foreign state as to settle the question. But here they were not, and we must determine this private controversy, even if it arises as to areas affected by an agreement between nations. *Ex parte Cooper*, 143 U. S. 472, with full discussion at 499-503. As a matter of fact the courts have not hesitated to determine the status of acquired territory for the purposes of a particular case and with reference to particular acts of Congress including those passed prior to such acquisition * * *."

IV.

The contentions urged by petitioners (pp. 13-15) that other governmental departments have taken a view on this issue which is in conflict with the holding in the Circuit Court was carefully considered by the Court below (R. 92 [note 1 and 2], 93-94 and notes). "But, notwithstanding defendants' contentions it seems clear they [governmental departments] have not" (R. 93). Even if we were to concede that the

Executive Departments had determined the issue, the Court, in determining personal and private rights, would be bound by the terms of the lease and agreement, even when, by doing so, it had to go counter to the position previously assumed by the Executive Department.

Willoughby, *The Constitutional Law of the United States*, (2d Ed.), Vol. 3, Section 855, page 1336;

Ex Parte Cooper, 143 U. S. 472, 499-503.

V.

In two New York cases squarely dealing with the question here presented, the courts held the Act applicable by virtue of the nature and scope of the leasehold agreement (R. 94-95)

Eckert v. *Elmhurst Contracting Co.*, 185 Misc. 108, 56 N. Y. S. (2d) 98, aff'd 186 Misc. 100, 61 N. Y. S. (2d) 730;

Crowe v. *Elmhurst Contracting Co.*, Sup. Court, N. Y. County, N. Y. L. J. April 17, 1947, page 1496.

CONCLUSION.

PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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